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In the

Supreme Court of the United States

OCTOBER TERM, 1980

WAYNE MINNICK, HENRY J. DARDEN, CALIFORNIA CORRECTIONAL OFFICERS ASSOCIATION,

Petitioners,

v.

CALIFORNIA DEPARTMENT OF CORRECTIONS, et al.,

Respondents.

On Petition for Writ of Certiorari to the California Court of Appeal, First Appellate District, Division Four

Brief for the American Federation of Labor and Congress of Industrial Organizations as Amicus Curiae

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The American Federation of Labor and Congress of Industrial Organization, a federation of 104 national and international unions with a total membership of 13,500,000 working men and women, files this brief *amicus curiae* with the consent of the parties as provided for in the Rules of this Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

The argument that follows is addressed to the passive virtues. Questions concerning the legality of race and sex conscious "affirmative action" policies are difficult and sensitive. Particularly, at the formative stage in the development of this body of law it is essential that the Court ad-

dress those questions in cases in which the record is certain and complete and this Court's answer will settle the underlying dispute. Neither of these traditional safeguards for considered decisionmaking is present here.

As we show in point I of our argument, there is no final judgment in this case for this Court to review; the Court therefore is without jurisdiction to decide the case. The California Court of Appeals remanded the case for a new trial in a context in which that trial could, even if this Court on the present record should determine that the challenged program is lawful, reach an opposite result based on additional facts.

And precisely because this case was tried before this Court's "affirmative action" decisions beginning with *United Jewish Organizations* v. *Carey*, 430 U.S. 144, the record contains little or nothing on many of the factors the Court has evaluated in determining whether a race-conscious program is lawful. Possibly that is why the court below permitted a new trial. That step was the state court's prerogative, but the lack of a solid record calls for this Court to dismiss the writ of *certiorari* as improvidentally granted.

Finally in point I, it is our submission that the state court did not have jurisdiction of the Title VII claim presented here. As we show, the language, the structure and the legislative history of the Civil Rights Act of 1964 and of the Equal Employment Opportunity Act of 1972 make it manifest that Congress intended to vest the federal courts with exclusive jurisdiction over Title VII claims. Thus, the Title VII question presented, which is substantial, is not properly before the Court for decision on the merits. The proper course of decision is to reach constitutional claims only after it is plain that the threshold statutory claims

are unsound. That course being closed off is an additional ground for dismissing the writ.

Given the nature of the last of the grounds we advance for not deciding this case, it is incumbent on us to show that the Title VII claim is indeed substantial and could control the disposition of this case. We seek to meet that obligation in point II of our argument. In deciding the Title VII question, the California Court of Appeal relied on *Steelworkers v. Weber,* 443 U.S. 193. The aspect of the program having to do with female employees follows the general outline of the USWA-Kaiser affirmative action plan. But, on the inadequate record here it is impossible to tell whether the Department's program meets the criteria of legality stated in *Weber, id.* at 208-209. The aspect of the program having to do with minority employees stands on a different footing. Its purpose as stated by the Court of Appeal is not to "abolish traditional patterns of racial segregation and hierarchy" (*id.* at 204) but to "promote the compelling interest of this State in the proper management of its correctional system." (Pet. App. A-17). That purpose is not consistent with the Act's overall purpose as delineated in *Weber* or with § 703(j), the provision relied on in *Weber.* Indeed, § 703(e)(1) which establishes a defense for employers based on operational needs to a claim of "sex", "religion", or "national origin" discrimination does not make such an exception for "race" or "color." While § 703 was shaped in 1964 when the Act covered only private employees, Congress' intent in 1972, when Title VII was extended to cover public employees, was to apply the same Title VII principle to all employers. (*Dothard v. Rawlinson,* 433 U.S. 321, 331-332, n. 14.) The sole relaxation of that approach is the exception in § 701 (f) narrowing the class of federal employees covered by the Act. Thus, there

are substantial reasons for believing that if the Title VII question were before the Court it would be determinative.

Finally, in point III we address the Constitutional issue tendered by petitioners. The so-called "affirmative action" cases this Court has previously measured against the Constitution all involved programs or plans which in one way or another were meant to end the racial divisions that exist in our society. In contrast, the "operational needs" justification offered in this case is not premised upon a design to redress racial division. Rather, it is built upon the reality that a significant degree of racial polarization remains in our society.

The dilemma that rationale presents is, we submit, particularly difficult to resolve. On the one hand, it cannot be denied that there are instances where the present state of racial division in this country poses a significant obstacle to the achievement of important governmental objectives. On the other hand, to accept that the racially-based "perceptions" of one group or another may dictate public policy is in part to validate those perceptions.

It is important to recognize in this connection that the "operational needs" justification, based as it is on "public perceptions," is not self-limited, as are the other "affirmative action" rationales this Court has reviewed, to situations where an advantage accrues only to some disadvantaged minority. Moreover, the "operational needs" justification has potential application to virtually every facet of government activity.

A question of this nature should not be addressed in a case such as this where the record does not frame the relevant considerations in bold relief, and the statutory avenues for resolution of the issues have not been exhausted. The writ of *certiorari* should therefore be dismissed.

ARGUMENT

I

A. The California Court of Appeal decided this case in a manner which will permit the parties, upon remand to the trial court, to cure the very evidentiary defects which make it dubious whether the matter is now appropriate for review by this Court on the issues presented. Those defects in themselves counsel the Court in its wise discretion to dismiss the writ of *certiorari* as improvidently granted, as we show in part B, *infra*. But first we demonstrate that because of the lower court's disposition, the judgment below is not final, and this Court lacks jurisdiction under 28 U.S.C. § 1257.

The Court of Appeal's judgment "reversed" the judgment and injunction issued by the Superior Court. (Pet. App. A-24). As this Court recognized in *Gospel Army* v. *City of Los Angeles*, 331 U.S. 543, "[i]n California, an unqualified reversal, 'that is to say, without direction to the trial courts,' is effective to remand the case 'for a new trial and places the parties in the same position as if the case had never been tried.' " (*Id.*, at 546) This rule of state practice has been clarified somewhat in the years since *Gospel Army* to make clear that the rule is not "a fetish of form" (*Stromer* v. *Browning*, 268 C.A.2d 513, 519), and that "a case [may] be set at large for retrial only when that is the intent of the appellate court." (*Id.*, at 518) But, while "[i]t is not the form of the order on the . . . appeal that controls, but the substance of that order" (*Snapp* v. *State Farm Fire & Gas Co.*, 66 Cal.2d 816, 821), in this instance it is quite clear, since the opinion twice recognized that the case could be retried (Pet.App. A-23, A-24), that the Court of Appeal chose the form of the disposition with care and specifically intended that the "case be set at large for retrial."

It is apparent that at the retrial, the factual record is likely to develop in a manner that may well change the outcome of the case in the California courts with respect to the federal issues. Thus, for example, while petitioners challenged the Department of Corrections' "affirmative action" program with respect to both hiring and promotion, they presented so little evidence on the hiring issue—perhaps because they were already employees of the Department—that the court below was unable to find a single "instance in which [a racial preference] had been exercised in the 'initial hiring' of a new employee." (Pet. App. A-7-A-8). With respect to promotion, while the Court of Appeal premised its decision on the assumption that the program worked not on the basis of rigid racial quotas or set-asides, but on the basis of "noncontrolling preferences" (Pet. App. A-17) —"'plus' factor[s]" (Pet. App. A-6)—petitioners in their brief here point to evidence that positions were set aside as "available for minorities or women only." (Pet. Br. 6; see also *id.*, at 5-9). And, while the Court of Appeal found the Department's preference system justified "because [it is] necessary to promote the compelling interest of this State in the proper management of its correctional system" (Pet. App. A-17), in this Court the Department offers an alternative justification for its program—*viz.*, that it is designed to remedy past discrimination by the Department. After a full new trial, each of these factual issues may be resolved differently than they were below, and the major factual premises for the Court of Appeal's legal rulings on the federal issues would thus be removed.

The Court of Appeal did not explain why it determined to give petitioners a second opportunity to prove facts they had once had a chance to establish. Quite possibly, however, the reason is the one we discuss below—that the case was tried before the relevant legal standards were available

even in vague outline. In effect, the Court of Appeal remanded for new findings of fact in light of this Court's intervening decisions in point. (Cf. Pet. App. A-24). That court's authority to do so as a matter of state procedure is not open to question here; but its exercise of that authority renders its decision non-final for federal purposes.

Given this posture, the present case lacks finality even more clearly than did the similar California disposition in *Gospel Army, supra.* In that case, this Court "dismiss[ed] the appeal *** for jurisdictional reasons" (331 U.S. at 544), explaining that "the effect of the judgment under state practice is to remand the case for a new trial [and] [n]othing in the opinion of the court is to the contrary" (*Id.*, at 548). In *Gospel Army,* the Court stated:

> We cannot assume that the Supreme Court of California would hold the ordinances in question constitutional no matter what facts might be presented upon a second trial. Indeed, experience demonstrates that particularly in constitutional cases issues turn upon factual presentation. [*Id.*]

The trend of this Court noted in *Gospel Army* to "become less formal in the matter of final judgments" (*id.*, at 547) has continued apace. (See *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469, 477.) We are aware of no case, however, in which this Court permitted a litigant who has the right to retry the central federal legal theories presented here to have review of a judgment as "final."

B. This case was tried in 1976. At that time, this Court had not decided *any* cases raising challenges to the legality of race, sex or national origin-conscious "affirmative action" policies. The principles now beginning to emerge for distinguishing the valid from the invalid in this area (see *United Jewish Organizations* v. *Carey,* 430 U.S. 144; *Regents of the University of California* v. *Bakke,* 438 U.S. 265;

Steelworkers v. *Weber*, 443 U.S. 193; *Fullilove* v. *Klutznick*, —— U.S. ——, 48 L.W. 4979) did not exist then even in embryonic form.

Given this circumstance, it is not surprising that the facts actually established below ill-suit the molds into which the parties are now seeking to pour them in order to conform to the legal theories of the intervening cases. For example, petitioners' original position was that *any* consideration of race or sex in hiring or promotion is invalid under, *inter alia,* Title VII and the federal Equal Protection Clause. Upon that theory, it made little difference what the objectives of the Department were, or whether the Department set numerical goals for minorities and women with respect to certain personnel decisions but not others. Nor was the precise manner in which any numerical goals were set or implimented of great relevance. At this juncture, however, this Court's decisions indicate that each of these factors is to be taken into account and may well be determinative of the outcome. But, as noted above, the record on these points is incomplete, indeterminant, as the contrasting statements of the facts show, and, under the Court of Appeal's remand to the trial court, subject to further development. That factual development may well dictate the outcome of the case on remand while in the meantime this Court is confronted with what may prove to be a hypothetical case.

In this circumstance it is appropriate to dismiss the writ of *certiorari* as improvidently granted. For when, upon the closer examination than the processes for reviewing petitions for a writ of *certiorari* permit, it develops that the central and seemingly novel issues advanced by the parties are either not presented by the record at all (*Iowa Beef Packers, Inc.* v. *Thompson*, 405 U.S. 228) or are presented

in a manner "too opaque to permit any satisfactory adjudication of that question" (*Wainwright* v. *New Orleans,* 392 U.S. 598 (Harlan, J., concurring)), this Court, in pursuit of the principles of selective review which underlie *certiorari* practice generally, has often dismissed the writ even after oral argument. (*See Rice* v. *Sioux City Memorial Park Cemetery,* 349 U.S. 70, 77-79.)

C. Because the issues presented for review include profound constitutional issues which solely because the case was instituted in state court, may not be avoidable through statutory construction, the Court's settled "policy of strict necessity in disposing of constitutional issues" (*Rescue Army* v. *Municipal Court,* 331 U.S. 549, 568) is pertinent here as well.

Petitioners have challenged the Department's race-conscious employment program as violative of Title VII, as well as of the Fourteenth Amendment. As we show in point II, *infra,* there are substantial arguments to be made in support of that statutory claim. The Title VII issue may accordingly be dispositive of the problem presented in this case, and thus obviate the need to decide the Constitutional issue which petitioners pose. In this circumstance it is "incumbent" on the courts to resolve the Title VII issue first. (*New York Transit Authority* v. *Beazer,* 440 U.S. 568, 582-583.)

In our view, however, for a reason addressed neither by the courts below nor in the documents filed in this Court before the writ of *certiorari* was granted, this Court is precluded from deciding the Title VII question: state courts do not have jurisdiction to entertain actions under Title VII and therefore there has never been subject-matter jurisdiction over the Title VII claim in this case.[1]

[1] Since "lack of jurisdiction . . . touching the subject matter of

Ordinarily state courts have the power concurrently with federal courts to enforce federally-created rights. (*Clafin* v. *Houseman*, 93 U.S. 130.) However, Congress may determine, when it creates a new right under federal law, to confine enforcement of that right to the federal courts. (*Id.*, at 137.) A determination to make federal court jurisdiction exclusive need not be expressly stated in the statute. Rather, there is concurrent jurisdiction only if "exclusive jurisdiction be neither express or *implied.*" (*Id.*, at 136 (emphasis supplied); *see also id.* at 137: "[Federal court] jurisdiction is sometimes exclusive by express enactment and *sometimes by implication.*" (emphasis supplied).) Since implied as well as express exclusivity must be respected, "whether [state courts] possessed [jurisdiction] in a particular case [is] a matter of construction of the Acts relating thereto." (*Id.*, at 140.) In this instance, the structure and language of Title VII so plainly contemplate federal court enforcement alone that the intent to provide only federal court jurisdiction *is* express even though the term "exclusive" is not used.

The scheme for judicial enforcement of rights created by Title VII is set forth in § 706(f)-(k) of the Act, 42 U.S.C. § 2000e-5(f)-(k), and in § 707, 42 U.S.C. § 2000e-6. In particular, the central jurisdictional section, 706(f)(3), provides that "[e]ach United States district court and each United States court of a place subject to the jurisdiction of the United States *shall have* jurisdiction of actions brought under this subchapter." (Emphasis supplied).

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the litigation cannot be waived by the parties," (*United States* v. *Griffin*, 303 U.S. 226, 229), this Court inquires into its own jurisdiction or that of the lower courts even though the jurisdictional issues were not properly raised or decided below. *See, e.g., Mount Healthy City Bd. of Educ.* v. *Doyle*, 429 U.S. 274, 278; *Seaboard Airline R. Co.* v. *Daniel*, 333 U.S. 118, 122.

This Court has on at least one occasion read similar language as sufficiently "express," without more, to mandate exclusive federal jurisdiction. (*Seaboard Air Lines Co.* v. *Daniel,* 333 U.S. 118, 122 (provision stating that district courts "shall have jurisdiction" over actions to review orders of the Interstate Commerce Commission, establishes exclusive jurisdiction).)

In this instance, any possible ambiguity is resolved by other aspects of § 706. For example, § 706(j) provides that "[*a*]*ny* civil action brought under this section . . . shall be subject to appeal as provided in §§ 1291 & 1292, Title 28." (Emphasis supplied). Sections 1291 & 1292, in turn, refer expressly to decisions and orders "of the district courts of the United States," and provide for appeal to federal courts of appeals. There is no sensible construction of § 706(j) which would recognize state court jurisdiction over a Title VII action and still give force to the universal language of the section.

Similarly, §§ 706(f)(4) & (5) contain references which make sense only upon the understanding that federal jurisdiction is exclusive. Thus, § 706(f)(4) provides that "the chief judge *of the district* . . . in which the case is pending [shall] designate a judge . . . to hear and determine the case." (Emphasis supplied). And, the section directs "the chief judge of the circuit" to, in certain circumstances, appoint "a district or circuit judge . . . to determine the case." The "district" and "circuit" judges referred to are *federal* judges; such terminology has no application to the judges of many states. Section 706(f)(5) provides:

> If [a] judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined, that judge may appoint a master pursuant to Rule 53 of the Federal Rules of Civil Procedure.

The Federal Rules of Civil Procedure, generally, of course, "govern procedure in the United States district courts" (Rule 1, Fed.R.Civ.Pro.), not in state courts. The references throughout Rule 53 to "the district court" or "the court" are therefore necessarily to the federal district court; for example, it is the "district court" which can appoint a master, and "the court" which fixes the master's compensation. A state court, consequently, could not possibly "appoint a master pursuant to Rule 53."[2]

Further, the venue provisions of the Act, § 706(f)(3), refer to "judicial districts," again a term in general meaningful only with respect to federal courts. And 28 U.S.C. §§ 1404 & 1406, incorporated in § 706(f)(3), are, once again, limited in their application to federal courts. Compare the separate venue provisions applicable to federal and state courts in the statutes construed in *Merchantile National Bank at Dallas* v. *Langdeau,* 371 U.S. 555, and *Testa* v. *Katt,* 330 U.S. 386.

Thus, while Title VII itself does not in terms state that federal court jurisdiction is "exclusive," the provisions it incorporates *are* expressly limited in their application to federal courts. The intended exclusivity is therefore apparent without need for further inquiry.[3] If further corroboration were needed, however, it may be found in "the particularized history behind the enactment of that provision of the federal . . . law." (*Charles Dowd Box Co.* v. *Courtney,* 368 U.S. 502, 508.)

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[2] For similar reasons, a state court cannot "[grant] preliminary or temporary relief . . . in accordance with Rule 65 of the Federal Rules of Civil Procedure." (§ 706(f)(2).)

[3] Title VII is replete with other procedural instructions regarding court actions. For example: "(t)he court may appoint an attorney . . . and may authorize the commencement of the action without the payment of fees, costs, or security." (§ 706(f)(1)); "(t)he court

In both 1964 and 1972, the original bills before the relevant committees concerning a federal equal employment guarantee provided for cease-and-desist enforcement powers in a federal administrative agency. (*See* H.R. 405, 88th Cong., 1st Sess. (1963); S. 1937, 88th Cong., 1st Sess. (1963); H.R. 1746, 92d Cong., 1st Sess. (1971). The model alluded to in explicating the proposed operation of Title VII with EEOC enforcement authority was the National Labor Relations Act, (*see, e.g.*, H.R. Rep. No. 92-238, 92d Cong., 1st Sess. 9 (1971); S. Rep. No. 92-415, 92d Cong., 1st Sess. 20 (1971)), and, in keeping with that model, review of agency action was expressly lodged in a "United States court of appeals." (H.R. 1746 *supra*, §§ 706(l) & (i).) Clearly, under that scheme there could be no concurrent jurisdiction in the state courts. (Cf. *Garner* v. *Teamsters Union*, 346 U.S. 485.)

The cease-and-desist-power proposal in 1964 failed to reach the floor of either House of Congress. Rather, the House Judiciary Committee, because it preferred that "the ultimate determination of discrimination rest with the Federal Judiciary," substituted an EEOC-initiated lawsuit for

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may . . . permit the Commission or the Attorney General . . . to intervene . . . upon certification that the case is of general public importance." (*id.*); "injunctive suits are to be "assign(ed) for hearing at the earliest possible date and . . . in every way expedited." (§ 706 (f) (2)). Unlike the procedural provisions discussed earlier, these instructions are not in terms applicable only to federal court actions. However, to ascribe to Congress an intent to authorize waiver of state court fees, or to issue orders regarding the expedition of state court lawsuits, would go considerably further in subordinating state court procedures to the federal will than this C ourt has done heretofore. (Compare *Dice* v. *Akron, Canton & Youngstown R. Co.*, 342 U.S. 359; *see also, Brown* v. *Gerdes*, 321 U.S. 178, 190 (Frankfurter, J. concurring); *Minneapolis & St. Louis R.R.* v. *Bombolis*, 241 U.S. 211.)

the Commission's cease-and-desist powers.[4] Later, there was a further compromise, removing the EEOC's authority to file suit and substituting private lawsuits.[5] Senator Humphrey, co-manager of the Civil Rights Act in the Senate, explained (1964 Leg. Hist. at 3003-3004):

> Under the House version, if conciliation by the Commission failed, the Commission, if it determined that there was reasonable cause to believe that the respondent had violated the title could bring suit for relief against him in Federal Court. The amendments of our substitute leave the investigation and conciliation functions of the Commission substantially intact. However, if the Commission has not been able to achieve voluntary compliance within 30 days . . . the person aggrieved . . . may bring his own suit in Federal Court.[6]

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[4] H.R. Rep. No. 914, 88th Cong., 1st Sess., reprinted in United States Equal Employment Opportunity Commission, Legislative History of Title VII and XI of the Civil Rights Act of 1964 (hereinafter "1964 Leg. Hist.") at 2150 (separate views of Rep. McCulloch, et al.); *see also* H.R. Rep. No. 1370, 87th Cong., 2d Sess. (1962), 1964 Leg. Hist. at 2160; 1964 Leg. Hist. at 3070-3071 (remarks of Senator Clark).

[5] In the same compromise bill, a provision was added giving the Attorney General authority to bring pattern and practice suits. 1964 Leg. Hist. at 3004. This provision expressly states that such suits are to be brought "in the appropriate district court of the United States." § 707(a), 42 U.S.C. § 2000e-b. Section 707 derived from Title II of the 1964 Act, dealing with public accommodations, and was meant to preserve "[t]he role of the Federal Government in obtaining enforcement of the title through litigation." 1964 Leg. Hist. 3007 (remarks of Senator Humphrey). There is no indication in the legislative materials that this express limitation of pattern and practice suits to federal courts was thought to create a different jurisdictional base for such suits than was applicable to private Title VII actions. If anything, in light of all the legislative history we have discussed, this express reference confirms the understanding of Congress that jurisdiction over all Title VII actions was to be exclusively in the federal courts.

[6] Similarly, there were perhaps dozens of statements by mem-

In 1972, there was a second attempt to provide for EEOC cease-and-desist power. While this attempt failed, the Act was amended, *inter alia*, to permit the EEOC itself to file civil actions. See, for this history, *Occidental Life Ins. Co.* v. *EEOC*, 432 U.S. 355, 362. Once again, the central issue was presented as one of the distribution of enforcement authority *within* the federal government. Thus, the opponents of cease-and-desist authority, who eventually prevailed, argued:

> [T]he most significant issue is what procedures will ensure the most effective enforcement of the substantive provisions of Title VII. [I]n the judicial approach the original finder of fact would be the federal district judge. [T]he district court approach is clearly preferable because relief can be more quickly granted [citing statistics comparing the timeliness of the NLRB with

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bers of Congress during the debate on the enforcement sections of the bill indicating, as Senator Humphrey's had indicated, that enforcement was to be in federal district court. *See, e.g.:* H.R. Rep. No. 914, *supra*, 1964 Leg. Hist., at 210 (minority views of Reps. Poff & Cramer) ("the Commission is required to bring a civil suit in the Federal district court"); 1964 Leg. Hist., at 3009 (remarks of Senator Clark) ("The . . . Equal Employment Opportunity Commission . . . would where necessary [file] suits in the Federal courts to compel compliance with the title"); *id.*, at 3027, comparative analysis by Senator Dirkson and Congressman McCulloch ("the aggrieved party may bring a civil action . . . in a U.S. district court."); *id.*, at 3039, (Clark-Case Interpretative Memorandum) ("[O]rdinarily a suit will be brought in a Federal district court . . . [except that] the Commission may decide not to bring suit . . . [T]he party allegedly discriminated against may . . . bring his own suit in Federal court."); *id.*, at 3088 (Memorandum inserted by Senator Javits) ("H.R. 7152 assigns the adjudicative function to the Federal district courts."); *id.*, at 3258 (remarks of Congressman Ryan) ("the Commission may seek relief in the Federal district court"); *id.*, at 3283 (remarks of Rep. Celler); *id.*, at 3284 (remarks of Rep. Celler); *id.*, at 3286-3287 (memorandum of Senator Case); *id.*, at 3308 (remarks of Senator Yarborough).

> that of the federal courts.] . . . United States district court proceedings provide procedural safeguards; Federal judges are well known in their areas, and enjoy great respect. . . . The Federal Rules of Civil Procedure, with respect to discovery, would greatly facilitate the collection of evidence for trial. . . . [H.R. Rep. No. 92-238, 92d Cong., 1st Sess. at 59-62 (Minority Views). *See also, e.g.*, U.S. Senate Committee on Labor and Public Welfare, Legislative History of the Equal Employment Opportunity Act of 1972, at 193 (remarks of Rep. Bolling; remarks of Rep. Martin.] [7]

In sum, the language, structure, and history of Title VII lead directly to the conclusion that Congress meant to establish exclusive jurisdiction in the federal courts over Title VII actions.[8] Accordingly, the courts below never had subject-matter jurisdiction over petitioners' Title VII claim, and this Court can not consider the merits of that claim. Because of petitioners' choice of forum then, this Court may have to confront the problem in this case as a Constitutional matter, when it otherwise might well have been—and in other cases could be—resolved on statutory grounds. We urge this Court to avoid such unnecessary Constitutional adjudication by dismissing the writ as improvidently granted.

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[7] With regard to individual causes of action, the 1972 Act continued the right of "the person aggrieved . . . to commence an action . . . in the proper United States district court." H.R. Rep. No. 92-238, *supra*, at 12; *See also, e.g.*, S. Rep. 92-415 *supra*, at 23; 1972 Leg. Hist., at 1837 (Joint Explanatory Statement of Managers At the Conference); *id.*, at 1845 (Senator Williams' Section-by-Section Analysis); *id.* at 1856 (remarks of Rep. Perkins on Conference Report.); *id.*, at 1863 (remarks of Rep. Dent.)

[8] This Court has premised at least one decision on the understanding that federal jurisdiction over Title VII cases is exclusive. In *New York Gaslight Club, Inc.* v. *Carey*, ... U.S. ....., 48 L.W. 4645, the Court was faced with the question whether an individual who had succeeded in obtaining relief in state court under a state

II

The California Court of Appeal disposed of petitioners' Title VII claim as follows (Pet. App. B-2):

> As amended, Title VII . . . prohibits discrimination by an "employer," in any area of nonexcepted employment . . . on the basis of an "individual's race, color, religion, sex, or national origin." . . . The prohibition reaches the Department, a public employer, as well as private employers. . . .
>
> The United States Supreme Court has . . . held, on the basis of the congressional intent underlying the title, that it does not prohibit *private* employers from voluntarily adopting "race-conscious affirmative action plans." (*United Steelworkers of America, AFL-CIO* v. *Weber et al.* (1979) [443 U.S. 193]. . . .) The Department has done precisely that, and the trial court found from substantial evidence that the plan it adopted had partially "motivated" the personnel practices challenged in this action. (See finding no. 8, quoted in fn. 5, *ante.*) The fact that the Department is a public employer suggests no basis for excluding it from the reach of the congressional intent and objectives analyzed in *United Steelworkers.* We accordingly perceive no violation of Title VII in the practices the Department's AAP has "motivated."

The court below was correct in concluding that for purposes of determining the meaning of Title VII's basic prohibition the fact that an employer is "private" or "pub-

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employment discrimination law could recover attorney's fees under Title VII for the state proceedings. The Court concluded that:

> §§ 706(f) and 706(k) of Title VII authorize a federal-court action to recover an award of attorney's fees for work done by the prevailing complainant in state proceedings to which the complainant was referred pursuant to the provisions of Title VII. *Id.* at

In so holding, this Court assumed that such an action could proceed *only* in federal court, for the Court stated, as a premise of its analysis, that but for the availability of a federal forum there could be no recovery of attorney's fees under Title VII.

lic" is irrelevant. As *Dothard* v. *Rawlinson*, 433 U.S. 321, which like this case involved the employment practices of a prison system, noted,

> . . . Congress expressly indicated the intent that the same Title VII principles be applied to governmental and private employers alike. See H.R. Rep. No. 92-238, p. 17 (1971); S. Rep. No. 92-415, p. 10 (1971). [433 U.S. at 331-332, n. 14.]

The legislative judgment to extend to public employers intact the substantive standards originally crafted to govern private employers was made in full awareness that those standards would be applied to the "governmental activities which are most visible to the minority communities (notably education, law enforcement, and the administration of justice)"; indeed in Congress' view those were the areas in which the "problem of employment discrimination is particularly acute and has the most deleterious effect." (H.R. Rep. No. 92-238, 92d Cong. 1st Sess., 17. To the same effect see S. Rep. No. 92-415, 92d Cong. 1st Sess., 10.) [9] To the extent that Congress desired a different regime in the public and private sectors that was accomplished in § 701(f) by excluding from coverage:

> [A]ny person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision.

[9] Since the House and Senate Committee bills that led to the 1972 Title VII amendments were drastically changed through floor action, the Committee Reports are not invariably authoritative. But since the final legislation did incorporate the extension of Title VII jurisdiction to the public sector essentially as proposed that caution does not apply in this instance.

With regard to these exclusions, the joint explanatory statement of managers at the conference states:

> It is the intention of the conferees to exempt elected officials and members of their personal staffs, and persons appointed by such elected officials as advisors or to policymaking positions at the highest levels of the departments or agencies of State or local governments, such as cabinet officers, and persons with comparable responsibilities at the local level. It is the conferees intent that this exemption shall be construed narrowly. Also, all employees subject to State or local civil service laws are not exempted. [S. Rep. No. 92-681, 92d. Cong. 2d Sess., 15-16.]

Section 701(f), then, embodies Congress' judgment of the precise extent to which the inherent functional differences between the public and private sectors should be given weight in developing a comprehensive statutory law of equal employment opportunity. That provision aside, Congress intended that on questions of coverage and legal obligation, private and public employers are to be regarded as a single class.

We believe, however, that the further conclusion of the court below that *Weber* controls the result here is erroneous. To be sure both that case and this one concern what this Court has termed "the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin, . . . Undoubtedly [this type of conduct] was the most obvious evil Congress had in mind when it enacted Title VII." (*Teamsters* v. *United States*, 431 U.S. 324, 335, n. 15.) The *Weber* Court of course concluded that there is a category where such conduct is not prohibited by Title VII. As the Court's careful statement of its rationale and holding demonstrates, that category does not extend, as the court below seemed to assume, to all "race-

conscious affiirmative action plans" regardless of purpose or content.

In *Weber,* the Court stated the scope of the matter before it for decision to be (443 U.S. at 200):

> The only question before us is the narrow statutory issue of whether Title VII *forbids* private employers and unions from voluntarily agreeing upon bona fide affirmative action plans that accord racial preferences in the manner and for the purpose provided in the Kaiser-USWA plan. [Emphasis in original.]

The *Weber* Court, in answering that question in the affirmative and rejecting the argument "that Congress intended in Title VII to prohibit all race conscious affirmative action plans," relied on two central components of the legislative record:

First (*id.* at 203, 204),

> [I]t was clear to Congress that "[t]he crux of the problem [was] to open employment opportunities for Negroes in occupations which have been traditionally closed to them," 110 Cong. Rec. 6548 (1964) (remarks of Sen. Humphrey), and it was to this problem that Title VII's prohibition against racial discrimination in employment was primarily addressed.
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> • • • • •
>
> The very statutory words intended as a spur or catalyst to cause "employers and unions . . . to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history," *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 418 (1975), cannot be interpreted as an absolute prohibition against all private, voluntary, race-conscious affirmative action efforts to hasten the elimination of such vestiges.

Second (*id.* at 205-206),

> Opponents of Title VII. . . . argued that the Act would be interpreted to *require* employers with racially imbalanced work forces to grant preferential treatment

> to racial minorities in order to integrate [, and] they argued that employers with racially imbalanced work forces would grant preferential treatment to racial minorities, even if not required to do so by the Act. . . . [In response] Congress added § 703(j) which addresses only the first objection. The section provides that nothing contained in Title VII "shall be interpreted to *require* any employer . . . to grant preferential treatment . . . on account of" a *de facto* racial imbalance in the employer's work force. The section does *not* state that "nothing in Title VII shall be interpreted to *permit*" voluntary affirmative efforts to correct racial imbalances. The natural inference is that Congress chose not to forbid all voluntary race-conscious affirmative action. [Footnote omitted.]

Finally, the Court cautioned (*id.* at 208):

> We need not today define in detail the line of demarcation between permissible and impermissible affirmative action plans. It suffices to hold that the challenged Kaiser-USWA affirmative action plan falls on the permissible side of the line. The purposes of the plan mirror those of the statute. Both were designed to break down old patterns of racial segregation and hierarchy. . . .
>
> At the same time, the plan does not unnecessarily trammel the interests of the white employees. . . . Moreover, the plan is a temporary measure; it is not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance.

In short, the Court concluded that Congress did not forbid a plan embodying that purpose and respecting those limitations because it constituted a means (albeit one different from the means required by the Act) for advancing toward the Act's ultimate goal.

While the plans at issue in *Weber* and in this case are both labeled with the tag "affirmative action" there are important differences between them. The California Court of Appeal found that (Pet. App. A-5):

> The Department adopted a documented "Affirmative Action Plan" (hereinafter "AAP") . . . [whose] principal objectives . . . include . . . increasing the number of "minority" employees to a level equalling at least 70% of any given "minority" in the inmate population of the Department (i.e., State prisoners).
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> * * * * *
>
> The AAP indicated, and there was evidence, that the desired "minority" level would serve inmate-related objectives of the Department by improving relationships with prisoners and reducing severe racial conflict and violence within the State prison system.[10]

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[10] In contrast, the objective of the program here at issue with respect to females is stated in terms of "a percentage level equivalent with that in the total 'California labor force.'" (Pet. App. A-5.) This formulation contrasts with the objective for minority employees which is stated in terms of a "level equalling at least 70% of any 'minority' in the inmate population of the Department (i.e., State prisoners)." (*Ibid.*) This difference appears to reflect a difference in the rationales underlying the two objectives. Whereas the objective for minorities is premised on the "operational needs" of the Department, the objective for females seems to be based on the more traditional "affirmative action" concept of redressing an underrepresentation of a deprived group in a particular work force. Thus, the questions with respect to the program for females are: (1) whether it meets the requirements of Title VII, as set forth in *Weber*, for "voluntary, race-conscious affirmative action plans"; and, if so, (2) whether it passes muster under the Fourteenth Amendment to the Constitution.

In our view, the factual record in this case does not allow for proper treatment of either of these issues. The Court in *Weber* identified a number of factors which were apparently significant in reaching the conclusion that the Kaiser-USWA plan was lawful. 443 U.S. at 208-209. The record here is inadequate for any meaningful analysis of the similarities and differences between the program here respecting females and the program in *Weber*. We do not know precisely how the program here works or what its effects are or have been. See point I, *supra*. *A fortiori* those record deficiencies pretermit any proper analysis of the Constitutional question, even were it possible to reach that question through resolution of the Title VII question in respondents' favor.

In *Weber* the purpose of the employer and the union was to achieve the result that would have occurred in a society free of discrimination—a cross section of employees in the workplace that accords with the general composition of the labor market. Here the employer's purpose in utilizing race-conscious employment criteria is to serve operational needs of the institution. That objective is not sanctioned by the overall purpose of Title VII, as delineated in *Weber,* nor does it find support in Congress' refusal to prohibit race-conscious efforts to "break down old patterns of racial segregation and hierarchy."

With regard to a race-conscious policy to end segregation, a provision elaborating on the basic prohibition stated in the Title (§ 703(j)) pushed toward the conclusion that the policy is lawful. In contrast, with regard to a race-conscious policy to further an employer's operational needs, the provision in Title VII that provides insight into Congress' intent pushes toward the conclusion that the policy is unlawful. Section 703(e)(1) provides:

> Notwithstanding any other provision of this title, (1) it shall not be an unlawful practice for an employer to hire and employ employees, . . . on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, . . .

This permission for certain religious, sex and national origin-conscious employment policies to meet employers' operational needs is "meant to be an extremely narrow exception to the general prohibition of discrimination. . . ." (*Dothard,* 433 U.S. at 334.) The failure to include "race" and "color" in the exception is conspicuous. It was noticed

by Cong. Williams who offered an amendment to add these classifications to the provision and explained (1964 Leg. Hist. at 3191):

> Mr. Chairman, why should there be discrimination against a Negro savings and loan association, with a provision that it would be compelled to hire white people whether it wished to or not? Why should there be discrimination against a Negro burial association, by telling it that it must hire white salesmen? Why should there be discrimination against a Negro insurance company, by telling it that it must hire white insurance salesmen, when they and all of us here know this would destroy the business completely because it would destroy its identity as a Negro business, the very quality responsible for its success?

Cong. Celler, Chairman of the House Judiciary Committee, and floor manager of the Civil Rights Act, replied (*Id.*):

> We did not include the word "race" because we felt that race or color would not be a bona fide qualification, as would be "national origin." That was left out. It should be left out.

Cong. Williams' amendment was defeated by a voice vote.[11] The Senate accepted § 703(e) as written by the House. The Clark-Case materials which explain the views of the Act's sponsors state (1964 Leg. Hist. at 3013-3014):

> Question. Section 704 describes the employment practices which are made unlawful by this bill. Subsection (e) of that section provides certain exceptions—namely: "where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to

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[11] See also the statement of Rep. Corman, in another context, that permitting black employers to hire black salesmen because their customers are black would require permitting white employers to hire only whites in the same circumstances—perpetuating the very attitudes the bill was designed to erase, 110 Cong. Rec. at 2559; see also *id.* at 2563 (Rep. Roosevelt).

> the normal operation of that particular business or enterprise''. . . . But what of other reasonable occupational qualifications? The Harlem Globe Trotters may well wish to preserve their racial identity. A movie company making an extravaganza on Africa may well decide to have hundreds of extras of a particular race or color to make the movie as authentic as possible. . . .
>
> Answer. Although there is no exemption in title VII for occupations in which race might be deemed a bona fide job qualition, a director of a play or movie who wished to cast an actor in the role of a Negro, could specify that he wished to hire someone with the physical appearance of a Negro—but such a person might actually be a non-Negro. Therefore, the act would not limit the director's freedom of choice. With regard to the Harlem Globe Trotters, it is probably true that they have less than 25 employees—and so they would not be covered by the act in any case. . . .

It would appear that in 1964 the sponsors of Title VII rejected the proposal that employers be permitted to make race-based employment decisions where those decisions would be ''reasonably necessary to the normal operation'' of their businesses. Of course, the argument that public employers should be allowed to take race into account when necessary to meet compelling public interests is, from a legislative viewpoint, a far stronger one. But so far as we have ascertained the only accommodation Congress appears to have made in 1972 to the special needs of public employers is the exclusion of certain categories of employees from coverage under the Act, see § 701(f), an exclusion that does not embrace the employees involved in this case. Our search of the legislative materials uncovered nothing indicating that Congress intended to provide an operational needs defense for public employers' race-based decisions beyond that provided by § 701(f). It may be, therefore, that the petitioners' Title VII claim, were it properly before

this Court (see point I-C, *supra*), would pretermit the other race discrimination issues in this case.[12]

III.

If the "operational needs" of the California Department of Corrections serve to validate the program here at issue under Title VII, then the Court must face a Constitutional issue different in nature from any it has faced before. The so-called "affirmative action" cases this Court has previously measured against the Constitution all involved programs or plans which in one way or another were meant to end the racial divisions that exist in our society. See *United Jewish Organizations* v. *Carey, supra,* (use of racial criteria in establishing voting districts to enhance opportunity for the election of minority representatives); *University of California Regeants* v. *Bakke, supra,* (use of racial quota in admissions to medical school to overcome disadvantages resulting from societal discrimination and to secure a racially diverse student body);[13] *Fullilove* v. *Klutznick, supra,*

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[12] Conceivably, a Constitutional question might arise were Title VII to prevent a State from carrying out its essential functions. See *National League of Cities* v. *Usery,* 426 U.S. 833; but see *Fitzpatrick* v. *Bitzer,* 427 U.S. 445, 453, n. 9.

[13] Mr. Justice Powell, writing separately, discussed an additional purpose of the quota program in *Bakke*. The purpose of "improving the delivery of health care services to communities underserved" (438 U.S. at 310). Justice Powell stated (*ibid.*):

> It may be assumed that in some situations a State's interest in facilitating the health care of its citizens is sufficiently compelling to support the use of a suspect classification. But there is virtually no evidence in the record indicating that petitioner's special admissions program is either needed or geared to promote that goal.

Subsequently, in *Fullilove, supra,* Justice Powell, in a concurring opinion, referred to that discussion in *Bakke* in the following passage (48 LW at 4995):

(use of minority set-aside to overcome "perpetuation of the effects of prior discrimination which had impaired or foreclosed access by minority businesses to public contracting opportunities," 48 LW 4987). As indicated by the diversity of views in the various opinions in these cases, the Constitutional issues raised by even such programs and plans are fraught with difficulty and complication.

The "operational needs" justification offered in this case is not premised upon a design to redress racial division. Rather, it is built upon the reality that a significant degree of racial polarization remains in our society; it would accommodate that reality in the service of legitimate state interests having nothing to do with race; and, in so doing, it would accept, and to a degree perpetuate, the existence of such polarization.

Therein lies the dilemma that this rationale presents—a dilemma which, we submit, is particularly difficult to resolve. On the one hand, it cannot be denied that there are instances where the present state of racial division in this country poses a significant obstacle to the achievement of important governmental objectives. The most striking example is perhaps the achievement of effective law enforcement in certain racially-tense communities. One court that has confronted this problem put the argument for a racially-based hiring program this way:

> The argument that police need more minority officers is not simply that blacks communicate better with blacks or that a police department should cater to the public's desires. Rather, it is that effective crime prevention and solution depend heavily on the public support and cooperation which result only from public

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Nor has Congress sought to employ a racially conscious means to further a nonracial goal. In such instances, a non-racial means should be available to further the legitimate governmental purpose. See *Bakke*, 438 U.S., at 310-311.

> respect and confidence in the police. In short, the focus is not on the superior performance of minority officers, but on the public's perception of law enforcement officials and institutions. It is therefore apparent that the district court misconstrued this justification for affirmative action, and that the justification offered by defendents is a substantial one. [*Detroit Police Officers' Ass'n* v. *Young*, 608 F.2d 671, 696 (6th Cir.) (petition for certiorari pending].

On the other hand, to accept that the racially-based "perceptions" of one group or another may dictate public policy is in part to validate those perceptions. The use of racial stereotypes as a premise for governmental action perpetuates those stereotypes and puts further off the day when racial polarization is not a pervasive factor in our society.

It is important to recognize in this connection that the "operational needs" justification, based as it is on "public perceptions," is not self-limited, as are the other "affirmative action" rationales this Court has reviewed, to situations where an advantage accrues only to some disadvantaged minority. To the contrary, pandering to the racial stereotypes of a majority constituency could as well, in many instances, significantly further an important governmental objective. The argument made in the *Detroit Police Officers'* case could as easily be made in many white communities to justify the preferential hiring of white police officers.

It is important too to recognize that the "operational needs" justification has potential application to virtually every facet of governmental activity. The effectiveness of teachers, social workers, psychologists, doctors, supervisors, bureaucrats, prosecutors, judges, and other governmental occupations may, in certain circumstances, depend

upon the racial perceptions of the person or group being served.

The logical reduction of the rationale is to divide government along racial lines, black public servants serving predominantly black communities, and whites serving whites. We do not suggest that such an extreme would result if this Court were to accept the "operational needs" rationale presented in this case as a compelling state interest for Fourteenth Amendment purposes. We do suggest that inherent in any such decision would be an acceptance, and a perpetuation, of some degree of racial polarization. Resolution of this Constitutional question requires some trade-off between the ability of governmental entities to meet today's exigencies and the opportunity for a future society free of racial polarization.

These are not reasons for refusing to decide the important questions petitioners press on the Court. The more basic the Constitutional issue to the development of this society the more certain it is that the Court must confront it. But they are the most compelling possible justifications for assuring that the case is properly here, that it presents those questions in a form that frames the relevant considerations in bold relief, and that the statutory avenues for resolution of the issues have been exhausted. None of those conditions is satisfied in this instance. The writ of *certiorari* should therefore be dismissed.

CONCLUSION

For the above stated reasons, the writ of *certiorari* should be dismissed.

Respectfully submitted,

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